Supreme Court, U.S.
FILED
MAR 5 2002
CLERK

No. 01-950

In The

SUPREME COURT OF THE UNITED STATES

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, and MILKY WAY FARMS,

Petitioners,

vs.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Thomas S. Knox Esq.*
John M. Lemmon, Esq.
Knox, Lemmon & Anapolsky, LLP
One Capitol Mall, Suite 700
Sacramento, California 95814
(916) 498-9911

*Counsel of Record
Attorneys for Amicus Curiae Dairy Institute of California

1498

QUESTIONS PRESENTED FOR REVIEW

I. Whether California's milk "pricing and pooling" regulations which directly burden dairy farmers in other states and which are separate and distinct from California's milk composition and labeling standards are exempted from the dormant Commerce Clause of the United States Constitution by section 144 of the 1996 Farm Bill?

II. Whether the legislative history of the 1996 Farm Bill, without more, is sufficient to establish an "unambiguous indication" and "unmistakenly clear" expression of congressional intent to exempt the 1997 Amendments to California's Pooling Plan from the dormant Commerce Clause of the United States?

In The

SUPREME COURT OF THE UNITED STATES

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, and MILKY WAY FARMS,

Petitioners,

vs.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

COMES now the Dairy Institute of California (hereafter "Dairy Institute") by and through its counsel and files the following Motion For Leave To File An Amicus Curiae Brief and Amicus Curiae Brief In Support Of Petitioners', Hillside Dairy Inc., A&A Dairy, L&S Dairy, and Milky Way Farms, Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

On this last day for filing amicus curiae briefs, Dairy Institute learned of developments within the last week which suggest that the ultimate outcome of the Hillside Dairy et al v. Lyons, et al, and the Ponderosa Dairy, et al. v. Lyons, et al. cases (Docket Nos. 01-950 and 01-1018, respectively) on petition to this honorable Court will have consequences extending beyond the interests of the private dairy farmer who are Petitioners herein. Dairy Institute's particular interests in this regard are explained below.

Dairy Institute obtained the written consent of the Petitioners in Hillside Dairy, et al. v. Lyons, et al (Docket No. 01-950) and Ponderosa Dairy et al. v. Lyons, et al (Docket No. 01-1018) through their counsel, and then requested the consent of Respondents.

The Respondents have withheld their consent arguing that, because of the lateness of Dairy Institute's request, the individuals responsible for deciding whether to grant such a consent cannot now all be consulted. However, as the documents attached hereto in Appendix A-1 indicate, the Respondents have been aware of the potential for amicus curiae filings at least since February 22, 2002, when the Deputy Attorney General for the State of California, Bruce Reeves, Esq., corresponded with this honorable Court regarding a second request for an extension of time. In that correspondence, Mr. Reeves expressly acknowledged the possibility that "some amici may seek to file briefs."

Since Dairy Institute's interests in this case have constitutional dimensions, and because the Respondent has failed to advance any material justifiable reason supporting its decision to withhold consent, Dairy Institute respectfully requests leave to file the following Amicus Curiae Brief.[1]

I. INTERESTS OF AMICUS CURIAE

Dairy Institute of California is a California non-profit mutual benefit trade association representing dairy processing companies that purchase 52% of the milk produced in California and manufacture over 80% of the fluid, frozen and cultured dairy products and cheese made in California. Many Dairy Institute members also have manufacturing facilities in other states.

California processors have historically supported California's regulated minimum pricing structure administered through the state's milk marketing program. This support has been based on a belief that the state's programs do not
adversely affect a processor's operations within the State, and do not reach beyond the state's borders in a manner prohibited by state federal laws.

California milk processors compete nationally with processors in other states on a wide variety of products. California milk processors depend on their ability to purchase milk from sources outside California in order to meet their obligations to customers while still remaining

---

[1] No counsel for any party to this proceeding authored this brief in whole, or in part. No person or entity other than *Amicus Curiae* Dairy Institute of California, its members or counsel, made any monetary contribution to the preparation or submission of this brief.

competitive with other suppliers operating in the same market. The ability of California processors to obtain milk from these out-of-state sources ensures that the marketplace remains competitive and that prices paid by processors are not unduly enhanced by milk suppliers.

The July 1997 amendments to California's Pooling Plan more fully described in the Petition for Writ of Certiorari filed by Petitioners in this matter (the "Amendments") have upset this balance. As a result of these Amendments, out-of-state dairy farmers receive significantly less if they sell their raw milk to California processors. This creates both an economic disincentive to sell their milk to California processors and threatens the economic viability of such dairy farming operations. The operation of these Amendments therefore threatens both California processors and consumers.

II. SUMMARY OF ARGUMENT

The opinion by the Court of Appeals for the Ninth Circuit raises critical issues involving the dairy industry in both California and the states which surround it. At the heart of the Ninth Circuit's decision is an erroneous method of interpreting Section 144 of the Federal Agriculture Improvement and Reform Act of 1996 (the "1996 Farm Bill") which, by itself, undermines a long line of decisions by this Court applying the dormant Commerce Clause.

In Section 144, Congress intended to provide California with an exemption from the dormant Commerce Clause as it applies to California laws and regulations governing labeling and compositional standards for milk. Section 144 contains no expression of congressional intent extending this exemption to state regulations involving the pooling and pricing of milk. Rather than attempting to locate an "unambiguous indication" and "unmistakenly clear" expression of congressional intent to also exempt California's pricing and pooling regulations, as this Court has long required, the Ninth Circuit instead looked solely to statements in the 1996 Farm Bill's legislative history to find

evidence of congressional intent. This improper method of statutory interpretation will allow both California, and other states within the Ninth Circuit's jurisdiction, to more freely burden interstate commerce.

III. ARGUMENT

Dairy Institute hereby adopts the arguments presented in Petitioners Hillside Dairy, Inc., A&A Dairy, L&S Dairy and Milky Way Farms' Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Dairy Institute also adopts the arguments of Amicus Curiae Nevada State Dairy Commission and the State of Nevada in support of that same Petition for Writ of Certiorari.

IV. CONCLUSION

The 1997 Amendments to California's Pooling Plan directly burden dairy farmers in other states and therefore violate the dormant Commerce Clause of the United States Constitution. These Amendments are not exempt from the prohibition of the dormant Commerce Clause by reason of Section 144 of the 1996 Farm Bill because there is no "unambiguous indication or "unmistakenly clear expression of congressional intent to do so in Section 144. For these reasons, Dairy Institute of California respectfully urges that a Writ of Certiorari issue.

Respectfully submitted,

Thomas S. Knox, Esq.*
John M. Lemmon, Esq.
Knox, Lemmon & Anapolsky, LLP
One Capitol Mall, Suite 700
Sacramento, California 95814
(916) 498-9911
Attorneys for Amicus Curiae Dairy Institute of California

March 5, 2002
*Counsel of Record

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I ST GRET,
P.O. B
SACRAMENTO, CA

Telephone: (916
Facsimile: (916
E-Mail: bruce.re/ves@

February 22, 2002

Via fax to 202-479-3268 and U.S. MAIL.

Mr. Frank J. Lorson
Chief Deputy Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543-0001

RE: Hillside Dairy, et al, v. Lyons, Docket No. 01-950
Ponderosa Dairy, et al, v. Lyons, Docket No. 01-1018
Consent of Hillside Counsel to Extension of Time To File Brief in Opposition

Dear Mr. Lorson:

This is simply to inform you that Keith Fischler of Thelen, Reid & Priest, representing the Petitioners in the *Hillside* matter, called me late yesterday to indicate that his client consents to the extension of time we requested yesterday, provided that it applies to all opposition briefs; he understands that some amici may seek to file briefs, but gave no specific information.

I have yet to hear back from Petitioners' counsel in *Ponderosa*.

We thank you for your prompt evaluation and approval of our request yesterday.

Sincerely,

BRUCE REEVES
Deputy Attorney General

For BILL LOCKYER
Attorney General

Co-counsel for Respondents William J. Lyons, Jr. and Robert Tad Bell, California Department of Food and Agriculture

BEST AVAILABLE COPY

BR:saa

cc: Keith Fischler (*Hillside*)
Richard Hesse (*Ponderosa*)
John Vetne (*Ponderosa*)

DECLARATION OF SERVICE (Supreme Court Rule 29.5(c))

Case Name: ***Hillside Dairy, et al. v. William J. Lyons, Jr., et al.*** - **Docket No. 01-950**
Ponderosa Dairy, et al. v. William J. Lyons, Jr., et al. - **Docket No. 01-1018**

I, Bruce F. Reeves, declare:

I am employed as a Deputy Attorney General at the California Attorney General's office in the County of Sacramento, State of California, and co-counsel for Respondents in the above-entitled matters.

On February 22, 2002, in accordance with Supreme Court Rules 30.4 and 29.5, I caused to be served by mail three (3) copies of the following documents:

CORRESPONDENCE ADDRESSED TO MR. FRANK J. LORSON CHIEF DEPUTY CLERK OF THE COURT RE CONSENT OF HILLSIDE COUNSEL TO EXTENSION OF TIME TO FILE BRIEF IN OPPOSITION

on all required parties, at the following addresses of record:

Charles M. English, Jr., Esq.
Keith Fischler, Esq.
Thelen, Reid & Priest, LLP
701 Pennsylvaniea Ave.,
N.W., Suite 800
Washington, D.C. 20004

Andrea Hackett Henningsen
Steefel, Levitt & Weiss
A Professional Corporation
One Embarcadero Center, 30th Fl.
San Francisco, CA 94111

John H. Vetne, Esq.
15 Powow Street
Amesbury, MA 01913

Richard Hesse, Esq.
2 White Street
Concord, NH 0330

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 25, 2002.

Bruce Reeves

BEST AVAILABLE COPY

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 12:
P.O. BOX 94425:
SACRAMENTO, CA 9

Telephone: (916)
Facsimile: (916)
E-Mail: bruce.n evans@

February 21, 2002

RECEIVED
MAR 01 2002

Via fax to 202-479-3268 and U.S. Post

Mr. Frank J. Lorson
Chief Deputy Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543-0001

RE: Hillside Dairy, et al, v. Lyons, Docket No. 01-950
Penderosa Dairy, et al, v. Lyons, Docket No. 01-1018
Request for Extension of Time To File Brief in Opposition to Petitions for Writ of Certiorari (Supreme Court Rule 30.4)

Dear Mr. Lorson:

This office represents the Respondents in the above matters, William J. Lyons, Jr. and Robert Todd Bell, California Department of Food and Agriculture. Respondents were previously granted an extension of time to file their brief in opposition, with the understanding that they would file a single document addressing both cases, on February 22, 2002. That extension amounted to nineteen days on case 01-950, and twelve days on case 01-1018.

We are now writing to request an additional extension of time to file our single brief in opposition in both cases, to Tuesday, March 5, 2002. If granted, this second extension would mean a total extension of 30 days, based on the earliest-docketed of the two cases.

The extension is necessary because the brief is still undergoing review by the Respondent agency, the California Department of Food and Agriculture, by their counsel, and by this office. The review process requires approval by a number of counsel and officials. The process has taken longer than expected, due to the complexity of the statutory scheme at issue in the two Petitions, which total a combined 53 pages in length.

We therefore request an eleven-day extension of time, such that the due date for the

opposition brief in both matters will be extended to Tuesday, March 5, 2002. We have asked Counsel of record for Petitioners in both *Ponderosa Dairy v. Lyons* and *Hillside Dairy v. Lyons*, to consent to this request, and we have yet to hear back from them. We will promptly call and/or fax your office with information concerning their consent as soon as we receive it.

Sincerely,

BRUCE REEVES
Deputy Attorney General

For BILL LOCKYER
Attorney General

Co-counsel for Respondents William J. Lyons, Jr. and Robert Tad Bell, California Department of Food and Agriculture

BR

cc: See attached Declaration of Service

NOTARIZED DECLARATION OF SERVICE (Supreme Court Rule 29.5(c))

Case Name: ***Hillside Dairy, et al. v. William J. Lyons, Jr., et al.*** **- Docket No. 01-950**
Ponderosa Dairy, et al. v. William J. Lyons, Jr., et al. **- Docket No. 01-1018**

I, Bruce F. Reeves, declare:

I am employed as a Deputy Attorney General at the California Attorney General's office in the County of Sacramento, State of California, and co-counsel for Respondents in the above-entitled matters.

On February 21, 2002, in accordance with Supreme Court Rules 30.4 and 29.5, I caused to be served by mail three (3) copies of the following documents:

CORRESPONDENCE OF FEBRUARY 21, 2002 ADDRESSED TO MR. FRANK J. LORSON, CHIEF DEPUTY CLERK OF THE SUPREME COURT OF THE UNITED STATES

on all required parties, at the following addresses of record:

Charles M. English, Jr., Esq.
Keith Fischler, Esq.
Thelen, Reid & Priest, LLP
701 Pennsylvanies Ave.,
N.W., Suite 800
Washington, D.C. 20004

Andrea Hackett Henningsen
Steefel, Levitt & Weiss
A Professional Corporation
One Embarcadero Center, 30th Fl.
San Francisco, CA 94111

John H. Vetne, Esq.
15 Powow Street
Amesbury, MA 01913

Richard Hesse, Esq.
2 White Street
Concord, NH 0330

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 21, 2002.

Bruce Reeves

State of California)
)
County of SACRAMENTO)
)

On 2-11-2002 (DATE) before me, Kathleen Dobson (NOTARY),

personally appeared Bruce Reeves (SIGNER(S))

☐ personally known to me -OR- ☑ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Kathleen Dobson
NOTARY'S SIGNATURE